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FILED

No. 10- 10-88

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IN THE

Supreme Court of the United States

GEOGRAPHIC EXPEDITIONS, INC.,

Petitioner,

v.

ELENA LHOTKA,
Individually and as Executor, etc., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
COURT OF APPEAL OF CALIFORNIA,
FIRST APPELLATE DISTRICT,
DIVISION THREE

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether, in concluding that the arbitration clause in the parties' contract was unconscionable, the California Court of Appeal violated Section 2 of the Federal Arbitration Act, 9 U.S.C. §§ 1-16 (FAA), by applying a different standard than the one used in other non-arbitration related provisions of consumer recreational contracts, thus singling out arbitration provisions for different treatment.

2. Whether, in concluding that the arbitration clause was unenforceable, the California Court of Appeal violated the mandates of the FAA by failing to allow the arbitrator to determine the enforceability of the trip participant contract as a whole.

LIST OF PARTIES

The parties in the appeal before the California Court of Appeal were Geographic Expeditions, Inc., which was the defendant and appellant in the California Court of Appeal, and the Estate of Jason Lhotka, by Elena Lhotka, Executrix, Elena Lhotka, Nicholas Lhotka, by his Guardian Ad Litem, Elena Lhotka, and Sandra Menefee, who were the plaintiffs and respondents in the California Court of Appeal.

CORPORATE DISCLOSURE STATEMENT

Innerasia Travel Group, Inc. owns 100% of the stock of the petitioner Geographic Expeditions, Inc. No publicly held company owns ten percent or more of the stock of Geographic Expeditions, Inc.

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OPINIONS BELOW

The January 29, 2010 opinion of the California Court of Appeal, First Appellate District, Division Three, is reported at 181 Cal. App. 4th 816, 104 Cal. Rptr. 3d 844 (2010). A copy is attached as Exhibit A in the petitioner's Appendix. The California Supreme Court denied petitioner's petition for review of the Court of Appeal's opinion on April 14, 2010, which is reported unofficially at 2010 Cal. LEXIS 3320 (Cal. Apr. 14, 2010). A copy is attached as Exhibit C in the petitioner's Appendix.

The unreported December 10, 2008 Order of the Superior Court of the State of California, County of San Francisco, denying petitioner's motion to dismiss or, in the alternative, to stay action and to compel arbitration is attached as Exhibit B in the petitioner's Appendix.

STATEMENT OF JURISDICTION

The California Supreme Court denied petitioner's petition for review of the judgment of the California Court of Appeal on April 14, 2010. (App. C at 22a). This Court has jurisdiction under 28 U.S.C. § 1257(a) to review the underlying judgment of the California Court of Appeal on a writ of certiorari.

STATUTORY PROVISIONS INVOLVED

(Federal Arbitration Act, 9 U.S.C. §§ 1-16)

9 U.S.C. § 2:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

STATEMENT OF THE CASE

1. The Case Below

The petitioner Geographic Expeditions, Inc. (GeoEx) is a tour operator specializing in adventure and cultural travel to destinations throughout the world. For one of its tours, GeoEx offered a hiking trek to the summit of Mount Kilimanjaro in Tanzania, called "The Real Kilimanjaro" trip.

The decedent, Jason Lhotka, and his mother, Sandra Menefee, were participants on this trek, with scheduled travel dates of September 22, 2007 through October 8, 2007. On or about October 4, 2007, Jason Lhotka, then

age 37, died, according to respondents, as a result of complications suffered during his climb. Respondents seek damages from GeoEx under various theories of liability.

At least four months prior to the September 22, 2007 departure date of the Real Kilimanjaro trip, GeoEx mailed tour participants a pre-departure packet of materials. These materials included, *inter alia*, a trip participant contract and a cover letter signed by GeoEx's president, James Sano. The cover letter stated in part:

> [O]ur lawyers, insurance carriers and medical consultants give us no discretion. A signed, unmodified release form is required before any traveler may join one of our trips.
>
> . . . My review of other travel companies' release forms suggests that our forms are not a whole lot different from theirs. In the end, I would strongly suggest you choose a company and the trip, not the forms. . . .

(App. A at 3a-4a).

The terms of the trip participant contract, which was separately signed by both Lhotka and Menefee (App. A at 2a), included, *inter alia*, a provision for binding arbitration before the American Arbitration Association in San Francisco, California. (App. A at 3a). Specifically, the contract provided as follows:

> I understand that all Trip Applications are subject to acceptance by GeoEx in San

> Francisco, California, USA. I agree that in the unlikely event a dispute of any kind arises between me and GeoEx, the following conditions will apply: (a) the dispute will be submitted to a neutral third-party mediator in San Francisco, California, with both parties splitting equally the costs of such mediator. If the dispute cannot be resolved through mediation, then (b) the dispute will be submitted for binding arbitration to the American Arbitration Association in San Francisco, California; (c) the dispute will be governed by California law; and (d) the maximum amount of recovery to which I will be entitled under any and all circumstances will be the sum of the land and air cost of my trip with GeoEx. I agree that this is a fair and reasonable limitation on the damages, of any sort whatsoever, that I may suffer.

(App. A at 3a).

On July 25, 2008, respondents filed their First Amended Complaint in the Superior Court of the State of California, San Francisco County. On September 15, 2008, GeoEx moved the trial court, under the FAA (App. B at 18a), to dismiss the case on the basis of the parties' written agreement to arbitrate, or in the alternative, to stay the action and to compel respondents to arbitrate.

By Order dated December 10, 2008, the trial court denied GeoEx's motion under the FAA, holding that the parties' agreement to arbitrate was both procedurally and substantively unconscionable under *Armendariz v.*

Foundation Health Psychcare Services, Inc., 24 Cal. 4th 83, 99 Cal. Rptr. 2d 745 (2000). (App. B at 18a-19a). As to the procedural unconscionability aspect of its decision, the trial court held:

> The Sano letter establishes that the agreement was presented as a Take It Or Leave It proposition and was also represented to be consistent with industry practice. As a consequence, if the plaintiff and defendant wished to go on this trip, they could do so only on these terms.

(App B at 18a). GeoEx timely appealed from the trial court's order to the California Court of Appeal, First Appellate District.

By Order dated January 29, 2010, the Court of Appeal, First Appellate District, affirmed the trial court's order denying GeoEx's motion to compel arbitration. Conceding that both procedural and substantive unconscionability must be present in some degree, the Court of Appeal determined that the parties' agreement to arbitrate was both procedurally and substantively unconscionable. (App. A at 6a-15a). Its finding of procedural unconscionability was based entirely upon Mr. Sano's letter advising the respondents (and all other prospective trip participants) that the terms of the trip participant contract were not negotiable and were no different from other tour operators' contracts, thus leaving the respondents with a lack of "meaningful choice." (App. A at 7a-12a).

On March 10, 2010, GeoEx filed a petition for review of the Court of Appeal's decision with respect to its finding of procedural unconscionability with the California Supreme Court, specifically arguing that the Court of Appeal decision violated the mandates of the FAA, by holding arbitration provisions in recreational contracts to a different unconscionability standard than other terms in recreational contracts. This petition was denied *en banc* by the California Supreme Court on April 14, 2010. (App. C at 22a).

2. Parallel Litigation in Federal Court

On October 6, 2008 – subsequent to the respondents' filing of their First Amended Complaint in the California Superior Court, but well before the December 8, 2008 decision on petitioner's state court motion to dismiss or stay – the petitioner filed, under the FAA, a motion to stay the state court action and to compel arbitration with the United States District Court for the Northern District of California.

On December 29, 2008, the district court denied petitioner's motion on jurisdictional grounds, determining that the amount in controversy did not meet the jurisdictional threshold of 28 U.S.C. § 1332(a) because of the contractual provision which limited damages to the sum of the land and air cost of the GeoEx trip. *Geographic Expeditions, Inc. v. Estate of Lhotka*, No. C 08-04624 SI, 2008 U.S. Dist. LEXIS 105691 (N.D. Cal. Dec. 29, 2008). GeoEx appealed that decision to the United States Court of Appeals for the Ninth Circuit, and on March 31, 2010, the Ninth Circuit reversed and remanded. *Geographic Expeditions, Inc. v. Estate of Lhotka*, 599 F.3d 1102 (9th Cir. 2010).

The matter has since returned to the district court for a substantive determination on GeoEx's October 2008 petition to compel arbitration and to stay the state court action. The next hearing is presently scheduled for August 13, 2010 on GeoEx's renewed motion and respondents' motion for judgment on the pleadings based upon principles of collateral estoppel.

REASONS FOR GRANTING THE PETITION

The FAA creates "a body of federal substantive law of arbitrability" and represents "a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary." *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983). The legislative history of the FAA makes clear that Congress intended "a broad reach of the Act, unencumbered by state-law restraints." *Southland Corp. v. Keating*, 465 U.S. 1, 13 (1984).

The decision of the California Court of Appeal has ignored the mandates of the FAA in two important respects.[1] First, the Court of Appeal, in denying the

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1. It is unfair and detrimental to the jurisdiction of the federal courts that the improper jurisdictional determination by the district court, and the delays associated with the successful appeal of same, would result in the state court action proceeding to final judgment, thereby depriving federal courts of the statutory jurisdiction vested in them under the FAA to enforce arbitration agreements involving interstate commerce. By granting this Petition, this Court would re-assert proper federal jurisdiction over this FAA matter and possibly avoid further litigation and appeals from whatever determination is ultimately made by the Northern District of California in that proceeding.

enforceability of the arbitration provision at issue, held said provision to a different unconscionability analysis than that used by California courts in determining the enforceability of other provisions in consumer recreational contracts. Second, in making this determination, the California Court of Appeal relied on facts related to the enforceability of the contract as a whole, as opposed to the enforceability of the arbitration clause itself and failed to allow the arbitrator to determine the enforceability of the agreement as a whole, again in violation of the FAA as interpreted by this Court.[2]

1. The Court of Appeal treated an arbitration provision in a recreational contract differently than California law treats other provisions in recreational contracts, thereby violating the mandate of the FAA.

Section 2 of the FAA provides that arbitration agreements shall be valid and enforceable "save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2.

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2. Respondents have asserted that the California Supreme Court's denial of GeoEx's petition for review collaterally estops any future action by the Northern District of California in enforcing the arbitration provision under the mandates of the FAA. But as stated by Justice Ginsburg in *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 291 n.7 (2005), a state court controversy "remains alive" during the pendency of a petition for writ of certiorari before this Court. Because the state court action relates to different, albeit related, legal issues from those at issue in the federal action, petitioner respectfully requests that this Court either grant this Petition or conclude that any denial of the Petition does not collaterally estop any action by the state court in connection with that pending action.

For several decades, this Court has consistently held that the FAA forbids arbitration clauses to be treated in a manner different from other contractual provisions. *E.g.*, *Rent-A-Center, West, Inc. v. Jackson*, ___ U.S. ___, No. 09-497, 2010 U.S. LEXIS 4981, at *8 (June 21, 2010) ("The FAA thereby places arbitration agreements on an equal footing with other contracts . . . and requires courts to enforce them according to their terms. . . .") (citations omitted); *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996) ("By enacting § 2 . . . Congress precluded States from singling out arbitration provisions for suspect status, requiring instead that such provisions be placed upon the same footing as other contracts."); *Perry v. Thomas*, 482 U.S. 483, 492 (1987) ("Nor may a court rely on the uniqueness of an agreement to arbitrate as a basis for a state-law holding that enforcement would be unconscionable, for this would enable the court to effect what we hold today the state legislature cannot.").

The California Court of Appeal's decision recognized that under California law, in order to invalidate a contract – or an arbitration clause therein – on the grounds of unconscionability, *both* procedural and substantive unconscionability must be demonstrated, using a "sliding scale" approach. (App. A at 6a). *See also Armendariz*, 24 Cal. 4th at 114, 99 Cal. Rptr. 2d at 767. "The procedural element requires oppression or surprise. . . . Oppression occurs where the contract involves lack of negotiation and meaningful choice, surprise where the allegedly unconscionable provision is hidden within a prolix printed form. . . ." (App. A at 6a). *See also Little v. Auto Stiegler, Inc.*, 29 Cal. 4th 1064, 1071, 130 Cal. Rptr. 2d 892, 897-98 (2003); *Crippen*

v. Central Valley RV Outlet, Inc., 124 Cal. App. 4th 1159, 1165, 22 Cal. Rptr. 3d 189, 192-93 (2004) (*citing Olsen v. Breeze, Inc.*, 48 Cal. App. 4th 608, 621, 55 Cal. Rptr. 2d 818, 824 (1996)).

In its decision, the California Court of Appeal held that the instant arbitration provision was both procedurally and substantively unconscionable. Specifically, the court concluded that procedural unconscionability was present because of the lack of market alternatives and the fact that the trip participant contract was "mandatory and unmodifiable." (App. A at 11a). The court made these determinations based solely upon the cover letter from Mr. Sano accompanying the trip participant contract, which required an unmodified release and which opined that other travel companies' terms and conditions "were no different." (App. A at 3a-4a, 7a).

Importantly, however, in the context of contracts for recreational or sporting activities, California courts have consistently ruled that there can be no "absence of meaningful choice," as consumers are always free to simply forgo the activity. Indeed, in numerous cases in California, the courts have rejected arguments alleging unconscionability in recreational contracts, holding that the plaintiff could simply forego the nonessential recreational activity. *E.g.*, *Belton v. Comcast Cable Holdings, LLC*, 151 Cal. App. 4th 1224, 1246, 60 Cal. Rptr. 3d 631, 650 (1st Dist. 2007) (holding that listening to music or FM radio is nonessential recreational activity that the blind plaintiff could simply have forgone if he disliked the requirement that he purchase the basic cable tier); *Olsen*, 48 Cal. App. 4th at 621-22, 55 Cal.

Rptr. 2d at 824 (holding that release in ski binding adjustment company contract was not unconscionable because skiing is a nonessential recreational activity); *Blue Booth v. Santa Barbara Biplane Tours, LLC*, 158 Cal. App. 4th 1173, 1179, 70 Cal. Rptr. 3d 660, 664-65 (2nd Dist. 2008) (enforcing aerial sightseeing tour release where there was "no authority that a recreational airplane ride is an essential service affecting the public interest"); *YMCA of Metro. L.A. v. Superior* Court, 55 Cal. App. 4th 22, 27-29, 63 Cal. Rptr. 2d 612, 615-16 (2nd Dist. 1997) (holding that the YMCA's simple recreational offerings of games, socializing, shopping, and eating lunch, were not so essential as to rob plaintiff of her free will in deciding whether to sign the release); *Madison v. Superior Court*, 203 Cal. App. 3d 589, 597-99, 250 Cal. Rptr. 299, 304-06 (2nd Dist. 1988) (upholding release where decedent drowned while participating in scuba diving course because "[decedent] certainly had the option of not taking the class. There was no practical necessity that he do so."); *Kurashige v. Indian Dunes, Inc.*, 200 Cal. App. 3d 606, 614, 246 Cal. Rptr. 310, 314 (2nd Dist. 1988) (rejecting plaintiff's contention that motorcycle park release was unconscionable where there was "no evidence plaintiff could not have ridden his motorcycle elsewhere without the constraints imposed upon him by defendants"); *Okura v. United States Cycling Federation*, 186 Cal. App. 3d 1462, 1468, 231 Cal. Rptr. 429, 432 (2nd Dist. 1986) (upholding exculpatory bike racing release because the services provided herein "can hardly be termed essential")[3]

3. In dozens of other cases, California courts reach the same conclusion. *See, e.g., Allan v. Snow Summit, Inc.*, 51 Cal. App. 4th 1358, 1377, 59 Cal. Rptr. 2d 813, 825 (4th Dist. 1996)

(Cont'd)

As evidenced by the plethora of authority cited above, under California law, there can be no procedural unconscionability (and thus no general finding of unconscionability) based on lack of meaningful choice in a typical consumer recreational contract. Here, however, the California Court of Appeal applied an unconscionability analysis to determine the efficacy of an arbitration clause in a recreational contract. By applying an unconscionability standard to an arbitration clause in a recreational contract, the court applied a different standard than that applied in connection with other provisions, such as general releases, found in recreational contracts.

(Cont'd)

(enforcing exculpatory skiing release and rejecting plaintiff's contention that release was unconscionable because "providing ski lessons is not a service of great importance to the public, and skiing is not a necessary or essential activity."); *Hulsey v. Elsinore Parachute Center*, 168 Cal. App. 3d 333, 342-43, 214 Cal. Rptr. 194, 199 (4th Dist. 1985) (upholding exculpatory skydiving release and rejecting plaintiff's contention that release was unconscionable; "[p]arachute jumping . . . is not an activity of great importance to the public and is a matter of necessity to no one. . . ."); *Platzer v. Mammoth Mountain Ski Area*, 104 Cal. App. 4th 1253, 1260, 128 Cal. Rptr. 2d 885, 889 (3rd Dist. 2002) (enforcing exculpatory skiing release and stating that "skiing, like other athletic or recreational pursuits, however beneficial, is not an essential activity") (citation omitted); *Randas v. YMCA of Metropolitan Los Angeles*, 17 Cal. App. 4th 158, 162, 21 Cal. Rptr. 2d 245, 247 (2nd Dist. 1993) (enforcing exculpatory swimming release and holding that "[s]wimming, like other athletic or recreational activities, however enjoyable or beneficial, is not 'essential' as a hospital is to a patient") (citation omitted).

Such a disparity is specifically prohibited by the FAA. *See Rent-A-Center*, *supra*, 2010 U.S. LEXIS 4981, at *8 ("The FAA thereby places arbitration agreements on an equal footing with other contracts . . . and requires courts to enforce them according to their terms. . . .") (citations omitted); *see also Securities Industries Assoc. v. Connelly*, 883 F.2d 1114, 1121 (1st Cir. 1989) ("the FAA ordains that the state's appulse toward arbitration agreements must be the same as its approach to contracts generally.").

The California Court of Appeal has acted contrary to the liberal federal policy favoring arbitration agreements found in *Moses H. Cone Mem. Hosp.* and its progeny. It has contravened both the language and spirit of the FAA. This Court should therefore grant this Petition to address and correct the court's error.

2. **The Court of Appeal violated the FAA by improperly failing to allow the arbitrator to determine the enforceability of the trip participant contract as a whole.**

As described above, the California Court of Appeal concluded that the arbitration clause at issue was unenforceable because it was both procedurally and substantively unconscionable. To reach this conclusion as to procedural unconscionability, the court relied solely on the cover letter from Mr. Sano accompanying the trip participant contract, which did not even specifically reference the arbitration provision. Rather, the letter merely discussed the trip participant contract as a whole. (App. A at 3a-4a). In so doing, the court made three errors: (1) it failed to segregate the validity of the arbitration clause from the validity of the contract as a

whole; (2) it improperly considered evidence outside of the arbitration clause itself to determine its enforceability; and, (3) it failed to allow the arbitrator to determine the enforceability of the entire trip participant contract.

In the recent case of *Rent-A-Center*, this Court re-affirmed the principle that an arbitration clause is severable from the contract as a whole. *Rent-A-Center, supra*, 2010 U.S. Dist. LEXIS 4981, at *13-*14 (citing *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 445 (2006) ("[A] party's challenge to another provision of the contract, or to the contract as a whole, does not prevent a court from enforcing a specific agreement to arbitrate. '[A]s a matter of substantive federal arbitration law, an arbitration provision is severable from the remainder of the contract.'")). Thus, as long as an arbitration provision is enforceable, it should be upheld, as a separate issue from the validity of the remainder of the contract.

As mentioned above, Mr. Sano's cover letter to the trip participants made no mention of the arbitration provision; rather, it only discussed the contract as a whole. Whatever import the cover letter had with regard to the respondents' lack of meaningful choice in entering into the GeoEx contract, however, that import dealt with the contract as a whole, not the arbitration provision itself. *See, e.g., Rent-A-Center, supra*, 2010 U.S. LEXIS 4981, at *18-*19 (rejecting claims that a delegation provision in an arbitration contract was procedurally unconscionable because the employment agreement of which it was a part was alleged to be imposed as a non-negotiable condition of employment). Thus, the court

improperly considered evidence outside the scope of the arbitration provision, and used that evidence to invalidate the arbitration clause.

Moreover, by concluding that the arbitration clause of the contract was unconscionable and therefore unenforceable, the court failed to allow the arbitrator to determine the validity of the remainder of the contract, in violation of the FAA as interpreted by this Court:

> [I]f the claim is fraud in the inducement of the arbitration clause itself . . . the federal court may proceed to adjudicate it. But the statutory language does not permit the federal court to consider claims of fraud in the inducement of the contract generally. . . . We hold, therefore, that in passing upon a § 3 application for a stay while the parties arbitrate, a federal court may consider only issues relating to the making and performance of the agreement to arbitrate.

Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 403-04 (1967).

Such a finding by the court was in error, as this question is *precisely* the type of issue that should have been left to the arbitrator to decide. In light of the above, the question of enforceability of the contract as a whole should have been left to the arbitrator.

CONCLUSION

The Court should grant this Petition to confirm the mandates of the FAA, which forbid arbitration clauses to be treated in a manner different from other contractual provisions, and which require issues pertaining to the enforceability of the contract as a whole, as opposed to the arbitration agreement, to be decided by the arbitrator rather than the courts.

Respectfully submitted,

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APPENDIX A — OPINION OF THE COURT OF APPEAL OF CALIFORNIA, FIRST APPELLATE DISTRICT, DIVISION THREE FILED JANUARY 29, 2010

COURT OF APPEAL OF CALIFORNIA, FIRST APPELLATE DISTRICT, DIVISION THREE

A123725

ELENA LHOTKA, Individually and as Executor, etc., et al.,

Plaintiffs and Respondents,

v.

GEOGRAPHIC EXPEDITIONS, INC.,

Defendant and Appellant.

181 Cal. App. 4th 816, 104 Cal. Rptr. 3d 844; 2010 Cal. App. LEXIS 114

January 29, 2010, Filed

JUDGES: Opinion by Siggins, J., with McGuiness, P. J., and Pollak, J., concurring.

OPINION BY: Siggins

Appendix A

OPINION

SIGGINS, J.—Geographic Expeditions, Inc. (GeoEx), appeals from an order denying its motion to compel arbitration of a wrongful death action brought by the survivors of one of its clients who died on a Mount Kilimanjaro hiking expedition. GeoEx contends the trial court erred when it ruled that the agreement to arbitrate contained in GeoEx's release form was unconscionable. Alternatively, GeoEx contends that if the court correctly concluded the arbitration clause was unconscionable, the court abused its discretion in striking the clause in its entirety rather than severing the objectionable provisions and enforcing the remainder. We find neither point is persuasive, and therefore affirm the order.

BACKGROUND

Jason Lhotka was 37 years old when he died of an altitude-related illness while on a GeoEx expedition up Mount Kilimanjaro with his mother, plaintiff Sandra Menefee.[1] GeoEx's limitation of liability and release form, which both Lhotka and Menefee signed as a requirement of participating in the expedition, provided that each of them released GeoEx from all liability in connection with the trek and waived any claims for liability "to the maximum extent permitted by law." The

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1. The other plaintiffs and respondents are Elena Lhotka, individually and as executor of the estate, and Nicholas Lhotka by his guardian ad litem (also Elena Lhotka).

release also required that the parties would submit any disputes between themselves first to mediation and then to binding arbitration. It reads: "I understand that all Trip Applications are subject to acceptance by GeoEx in San Francisco, California, USA. I agree that in the unlikely event a dispute of any kind arises between me and GeoEx, the following conditions will apply: (a) the dispute will be submitted to a neutral third-party mediator in San Francisco, California, with both parties splitting equally the cost of such mediator. If the dispute cannot be resolved through mediation, then (b) the dispute will be submitted for binding arbitration to the American Arbitration Association in San Francisco, California; (c) the dispute will be governed by California law; and (d) the maximum amount of recovery to which I will be entitled under any and all circumstances will be the sum of the land and air cost of my trip with GeoEx. I agree that this is a fair and reasonable limitation on the damages, of any sort whatsoever, that I may suffer. [¶] I agree to fully indemnify GeoEx for all of its costs (including attorneys' fees) if I commence an action or claim against GeoEx based upon claims I have previously released or waived by signing this release." Menefee paid $16,831 for herself and Lhotka to go on the trip.

A letter from GeoEx president James Sano that accompanied the limitation of liability and release explained that the form was mandatory and that, on this point, "our lawyers, insurance carriers and medical consultants give us no discretion. A signed, unmodified release form is required before any traveler may join one of our trips. [¶] Ultimately, we believe that you should

choose your travel company based on its track record, not what you are asked to sign. . . . My review of other travel companies' release forms suggests that our forms are not a whole lot different from theirs."

After her son's death, Menefee sued GeoEx for wrongful death and alleged various theories of liability including fraud, gross negligence and recklessness, and intentional infliction of emotional distress. GeoEx moved to compel arbitration.

The trial court found the arbitration provision was unconscionable under *Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83 [99 Cal. Rptr. 2d 745, 6 P.3d 669] (*Armendariz*), and on that basis denied the motion. It ruled: "The agreement at issue is both procedurally and substantively unconscionable. . . . The Sano letter establishes that the agreement was presented as a Take It Or Leave It proposition and was also represented to be consistent with industry practice. As a consequence[,] if the plaintiff and decedent wished to go on this trip, they could do so only on these terms. Unconscionability also permeates the substantive terms of the agreement to arbitrate. The problematic terms are the limitation on damages, the indemnity of GeoEx, the requirement that GeoEx costs and attorneys' fees be paid if suit is filed related to certain claims, splitting the costs of mediation, the absence of an agreement on the cost of arbitration and the lack of mutuality as to each of these terms. As a consequence, this is not a case where the court may strike a single clause and compel arbitration."

This appeal timely followed.

DISCUSSION

The questions posed here are (1) whether the agreement to arbitrate is unconscionable and, therefore, unenforceable; and (2) if so, whether the court properly declined to enforce the entire arbitration clause rather than sever unconscionable provisions. We answer both questions in the affirmative.

I. *Standard of Review*

On appeal from the denial of a motion to compel arbitration, "[u]nconscionability findings are reviewed de novo if they are based on declarations that raise 'no meaningful factual disputes.' [Citation.] However, where an unconscionability determination 'is based upon the trial court's resolution of conflicts in the evidence, or on the factual inferences which may be drawn therefrom, we consider the evidence in the light most favorable to the court's determination and review those aspects of the determination for substantial evidence.' [Citation.] The ruling on severance is reviewed for abuse of discretion." (*Murphy v. Check 'N Go of California, Inc.* (2007) 156 Cal.App.4th 138, 144 [67 Cal. Rptr. 3d 120]; see *Armendariz, supra*, 24 Cal.4th at p. 122.) In keeping with California's strong public policy in favor of arbitration, any doubts regarding the validity of an arbitration agreement are resolved in favor of arbitration. (*Coast Plaza Doctors Hospital v. Blue Cross of California* (2000) 83 Cal.App.4th 677, 686 [99 Cal. Rptr. 2d 809]; see *Armendariz, supra*, at p. 97.)

II. *Unconscionability*

(1) We turn first to GeoEx's contention that the court erred when it found the arbitration agreement unconscionable. Although the issue arises here in a relatively novel setting, the basic legal framework is well established. " '[U]nconscionability has generally been recognized to include an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party.' [Citation.] Phrased another way, unconscionability has both a 'procedural' and a 'substantive' element." (*A & M Produce Co. v. FMC Corp.* (1982) 135 Cal.App.3d 473, 486 [186 Cal. Rptr. 114].) " 'The procedural element requires oppression or surprise. [Citation.] Oppression occurs where a contract involves lack of negotiation and meaningful choice, surprise where the allegedly unconscionable provision is hidden within a prolix printed form. [Citation.] The substantive element concerns whether a contractual provision reallocates risks in an objectively unreasonable or unexpected manner.' [Citation.] Under this approach, both the procedural and substantive elements must be met before a contract or term will be deemed unconscionable. Both, however, need not be present to the same degree. A sliding scale is applied so that 'the more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the term is unenforceable, and vice versa.' ? (*Morris v. Redwood Empire Bancorp* (2005) 128 Cal.App.4th 1305, 1317 [27 Cal. Rptr. 3d 797], quoting *Armendariz, supra*, 24 Cal.4th at p. 114; see *A*

& M Produce Co., supra, at p. 486.) This notion of a "sliding scale," as will be seen, figures centrally in the analysis of the agreement at issue here.

A. Procedural Unconscionability

GeoEx argues the arbitration agreement involved neither the oppression nor surprise aspects of procedural unconscionability. GeoEx argues the agreement was not oppressive because plaintiffs made no showing of an "industry-wide requirement that travel clients must accept an agreement's terms without modification" and "they fail[ed] even to attempt to negotiate" with GeoEx. We disagree. GeoEx's argument cannot reasonably be squared with its own statements advising participants that they must sign an *unmodified* release form to participate in the expedition; that GeoEx's "lawyers, insurance carriers and medical consultants give [it] no discretion" on that point; and *that other travel companies were no different.*[2] In other words, GeoEx led plaintiffs to understand not only that its terms and conditions were nonnegotiable, but that plaintiffs would encounter the same requirements with any other travel company. This is a sufficient basis for us to conclude plaintiffs lacked bargaining power.

GeoEx also contends its terms were not oppressive, apparently as a matter of law, because Menefee and

2. This is the clear import of Sano's letter and, in any event, it is also the trial court's interpretation, which we accept because it is supported by substantial evidence. (*Murphy v. Check'N Go of California, Inc., supra,* 156 Cal.App.4th at p. 144.)

Lhotka could have simply decided not to trek up Mount Kilimanjaro. It argues that contracts for recreational activities can *never* be unconscionably oppressive because, unlike agreements for necessities such as medical care or employment, a consumer of recreational activities *always* has the option of foregoing the activity. The argument has some initial resonance, but on closer inspection we reject it as unsound.

(2) While the nonessential nature of recreational activities is a factor to be taken into account in assessing whether a contract is oppressive, it is not necessarily the dispositive factor. *Szetela v. Discover Bank* (2002) 97 Cal.App.4th 1094 [118 Cal. Rptr. 2d 862] is informative. The defendant, a credit card company, argued the plaintiff could not establish procedural unconscionability because there were "market alternatives" to its product—i.e., the plaintiff had the option of taking his business to a different bank. The court disagreed, and held the customer's ability to walk away rather than sign the offending contract was not dispositive. "The availability of similar goods or services elsewhere may be relevant to whether the contract is one of adhesion, but even if the clause at issue here is not an adhesion contract, it can still be found unconscionable. Moreover, 'in a given case, a contract might be adhesive even if the weaker party could reject the terms and go elsewhere. [Citation.]' [Citation.] Therefore, whether Szetela could have found another credit card issuer who would not have required his acceptance of a similar clause *is not the deciding factor.*" (*Id.* at p. 1100, italics added; see also *Harper v. Ultimo*

(2003) 113 Cal.App.4th 1402, 1408–1409 [7 Cal. Rptr. 3d 418].) The focus of procedural unconscionability in *Szetela*, rather, was on the manner in which the disputed clause was presented. Faced with the options of either closing his account or accepting the credit card company's "take it or leave it" terms, Szetela established the necessary element of procedural unconscionability despite the fact that he could have simply taken his business elsewhere. (*Szetela, supra*, at p. 1100.)

The cases on which GeoEx relies do not hold otherwise. GeoEx relies on *Morris v. Redwood Empire Bancorp, supra*, 128 Cal.App.4th at page 1320, for its statement that the " 'procedural element of unconscionability may be defeated[] if the complaining party has a meaningful choice of reasonably available alternative sources of supply from which to obtain the desired goods and services free of the terms claimed to be unconscionable.' " "[M]ay be defeated," true—but not "must," in all cases and as a matter of law. *Morris* takes its premise from *Dean Witter Reynolds, Inc. v. Superior Court* (1989) 211 Cal.App.3d 758, 772 [259 Cal. Rptr. 789], in which Division Two of this court expressly declined to hold or suggest "that *any* showing of competition in the marketplace as to the desired goods and services defeats, as a matter of law, *any* claim of unconscionability." Indeed, *Morris* itself recognizes that some contracts may be oppressive despite the availability of market alternatives, albeit in the context of employment or medical care—i.e., contracts for " 'life's necessities.' " (*Morris, supra*, at p. 1320, quoting *West v. Henderson* (1991) 227 Cal.App.3d 1578, 1587 [278 Cal.

Rptr. 570]; see *Armendariz, supra*, 24 Cal.4th at p. 115 [employment].)

Many of the other authorities cited by GeoEx are inapposite because they concern challenges to release of liability clauses under the rule that invalidates exculpatory provisions that affect the public interest. (See *Tunkl v. Regents of University of California* (1963) 60 Cal.2d 92, 96–97 & fn. 6 [32 Cal. Rptr. 33, 383 P.2d 441]; Civ. Code, § 1668.) In this specific context, our courts consistently hold that recreation does not implicate the public interest, and therefore approve exculpatory provisions required for participation in recreational activities. (See, e.g , *Randas v. YMCA of Metropolitan Los Angeles* (1993) 17 Cal.App.4th 158, 161–162 [21 Cal. Rptr. 2d 245] [swim class]; *Saenz v Whitewater Voyages, Inc.* (1990) 226 Cal.App.3d 758, 764 [276 Cal. Rptr. 672] [river rafting]; *Madison v Superior Court* (1988) 203 Cal.App.3d 589, 597?599 [250 Cal. Rptr. 299] [scuba diving]; *Paralift, Inc. v. Superior Court* (1993) 23 Cal.App.4th 748, 756 [29 Cal. Rptr. 2d 177] [skydiving]; *Buchan v. United States Cycling Federation, Inc.* (1991) 227 Cal.App 3d 134 [277 Cal. Rptr. 887] [cycle racing]; *Coates v Newhall Land & Farming, Inc.* (1987) 191 Cal.App.3d 1, 8 [236 Cal. Rptr. 181] [riding dirtbike]; *Kurashige v. Indian Dunes, Inc.* (1988) 200 Cal.App.3d 606, 611–612 [246 Cal. Rptr. 310] [motorcycle dirtbike].) But these cases do not focus on unconscionability, and they do not hold that contracts for recreational activities are immune from analysis for procedural unconscionability.

(3) Here, certainly, plaintiffs could have chosen not to sign on with the expedition. That option, like any availability of market alternatives, is relevant to the existence, and degree, of oppression. (See *Szetela v. Discover Bank, supra*, 97 Cal.App.4th at p. 1100; *Laster v. T-Mobile USA, Inc.* (S D.Cal. 2005) 407 F.Supp.2d 1181, 1188 & fn. 1; see also *Allan v Snow Summit, Inc.* (1996) 51 Cal.App.4th 1358, 1376 [59 Cal. Rptr 2d 813] [nonessential, recreational nature of skiing was one of several factors that indicated a release clause was not substantively unconscionable]; but see *Belton v Comcast Cable Holdings, LLC* (2007) 151 Cal.App.4th 1224, 1246 [60 Cal. Rptr. 3d 631] [dictum that availability of other cable providers defeated claim of unconscionability].) But we must also consider the other circumstances surrounding the execution of the agreement. GeoEx presented its limitation of liability and release form as mandatory and unmodifiable, and essentially told plaintiffs that any other travel provider would impose the same terms. "Oppression arises from an inequality of bargaining power which results in no real negotiation and an absence of meaningful choice . . . ." (*Crippen v Central Valley RV Outlet* (2004) 124 Cal.App.4th 1159, 1165 [22 Cal. Rptr. 3d 189] [finding no oppression where evidence showed no circumstances surrounding the execution of the agreement, so no showing of unequal bargaining power, lack of negotiation, or lack of meaningful choice].) Here, in contrast to *Crippen*, GeoEx presented its terms as both nonnegotiable and *no different than what plaintiffs would find with any other provider* Under these circumstances, plaintiffs made a sufficient showing to establish at least a minimal

level of oppression to justify a finding of procedural unconscionability. (See *Morris v. Redwood Empire Bancorp, supra*, 128 Cal.App.4th at p. 1319 ["our task is not only to determine *whether* procedural unconscionability exists, but more importantly, *to what degree* it may exist"].)

B. Substantive Unconscionability

With the "sliding scale" rule firmly in mind (*Armendariz, supra*, 24 Cal.4th at p. 114), we address whether the substantive unconscionability of the GeoEx contract warrants the trial court's ruling. *Harper v. Ultimo, supra*, 113 Cal.App.4th 1402, is analogous. The Harpers hired a contractor to perform work on their property. The contractor allegedly broke a sewer pipe, causing concrete to infiltrate the plaintiffs' soil, plumbing and sewer and wreak havoc on their backyard drainage system. Unfortunately for the Harpers, the arbitration provision in the construction contract limited the remedies against their contractor to a refund, completion of work, costs of repair or any out-of-pocket loss or property damage—and then capped any compensation at $ 2,500 unless the parties agreed otherwise in writing.

(4) In the words of Justice Sills, substantive unconscionability was "so present that it is almost impossible to keep from tripping" over it. (*Harper v. Ultimo, supra*, 113 Cal.App.4th at p. 1406.) "Substantive unconscionability focuses on the one-sidedness or overly harsh effect of the contract term or clause. [Citation.]

In the present case, the operative effect of the arbitration is even more one-sided against the customer than the clauses in any number of cases where the courts have found substantive unconscionability. (E.g., *Little v. Auto Stiegler, Inc.* (2003) 29 Cal.4th 1064 [130 Cal. Rptr. 2d 892, 63 P.3d 979] [either party could appeal any award of more than $ 50,000 to second arbitrator]; *Szetela v. Discover Bank*[, *supra,*] 97 Cal.App.4th 1094 . . . [arbitration clause absolutely barred class actions]; *Saika v. Gold* (1996) 49 Cal.App.4th 1074 [56 Cal. Rptr. 2d 922] [arbitration award could be rejected if it exceeded $ 25,000].) As in *Little*, *Szetela* and *Saika*, the limitation of damages provision here is yet another version of a 'heads I win, tails you lose' arbitration clause that has met with uniform judicial opprobrium." The arbitration provision in the Harpers' contract did not allow even a theoretical possibility that they could be made whole, because there was no possibility of obtaining meaningful compensation unless the contractor agreed—which, not surprisingly, it did not. (*Harper v. Ultimo, supra,* at p. 1407.)

The arbitration provision in GeoEx's release is similarly one-sided as that considered in *Harper*. It guaranteed that plaintiffs could not possibly obtain anything approaching full recompense for their harm by limiting any recovery they could obtain to the amount they paid GeoEx for their trip. In addition to a limit on their recovery, plaintiffs, residents of Colorado, were required to mediate and arbitrate in San Francisco—all but guaranteeing both that GeoEx would never be out more than the amount plaintiffs had paid for their trip,

and that any recovery plaintiffs might obtain would be devoured by the expense they incur in pursing their remedy.[3] The release also required plaintiffs to indemnify GeoEx for its costs and attorney fees for defending any claims covered by the release of liability form.[4] Notably, there is no reciprocal limitation on damages or indemnification obligations imposed on GeoEx. Rather than providing a neutral forum for dispute resolution, GeoEx's arbitration scheme provides a potent disincentive for an aggrieved client to pursue any claim, in any forum—and may well guarantee that GeoEx wins even if it loses. Absent reasonable justification for this arrangement—and none is apparent—we agree with the trial court that the arbitration clause is so one-sided as to be substantively

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3. The requirement that the parties share the cost of mediation does not factor into our analysis that the agreement is substantively unconscionable. Whether such cost sharing is appropriate depends on a number of issues that we need not consider. (See *D.C. v. Harvard-Westlake School* (2009) 176 Cal.App.4th 836, 860–864 [98 Cal. Rptr. 3d 300].)

4. GeoEx is wrong when it claims the trial court erred "in even considering clauses outside the arbitration provision," such as the limitation of liability and indemnification provisions, "etc." It is unclear which "etc." provisions GeoEx contends are "outside" the arbitration clause, but the limitation of liability clause GeoEx specifically identifies appears as subdivision (d) of the paragraph that requires arbitration, while the indemnification provision that immediately follows it is substantively relevant to whether or not the proposed arbitration system would provide an unacceptably one-sided forum for dispute resolution.

unconscionable. (See *Armendariz, supra*, 24 Cal.4th at p. 121 [damages remedy unilaterally limited]; *Pinedo v. Premium Tobacco Stores, Inc.* (2000) 85 Cal.App.4th 774, 781 [102 Cal. Rptr. 2d 435] [damages remedy limited, plaintiff required to pay all costs, and required hearing location was in Oakland].)

III. *Severability*

GeoEx argues that, even if the limitation of liability provision was unconscionable, the court abused its discretion when it refused to strike it and enforce the remainder of the arbitration clause. We disagree.

(5) Civil Code section 1670.5, subdivision (a) gives the trial court discretion to either refuse to enforce a contract it finds to be unconscionable, or to strike the unconscionable provision and enforce the remainder of the contract. It provides: "If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result." The trial court has discretion under this statute to refuse to enforce an entire agreement if the agreement is "permeated" by unconscionability. (*Armendariz, supra*, 24 Cal.4th at p. 122; *Murphy v. Check 'N Go of California, Inc., supra*, 156 Cal.App.4th at p. 149.) An arbitration agreement can be considered permeated by unconscionability if it

"contains more than one unlawful provision. . . . Such multiple defects indicate a systematic effort to impose arbitration . . . not simply as an alternative to litigation, but as an inferior forum that works to the [stronger party's] advantage." (*Armendariz, supra*, at p. 124; see *Murphy, supra*, at p. 148.) "The overarching inquiry is whether' "the interests of justice . . . would be furthered" ' by severance." (*Armendariz, supra*, at p. 124.)

(6) Here, the trial court identified multiple elements of the agreement that indicate GeoEx designed its arbitration clause "not simply as an alternative to litigation, but as an inferior forum" that would give it an advantage. In addition to limiting plaintiffs' recovery, the agreement required them to indemnify GeoEx for its legal costs and fees if they pursued any claims covered by the release agreement. These one-sided burdens were compounded by the requirements that plaintiffs pay half of any mediation fees and mediate and arbitrate in San Francisco, GeoEx's choice of venue, far from plaintiffs. It was within the court's discretion to conclude this agreement was so permeated by unconscionability that the interests of justice would not be furthered by severing the damages limitation clause and enforcing the remainder. (*Armendariz, supra*, 24 Cal.4th at p. 124.)

DISPOSITION

The order denying GeoEx's motion to compel arbitration is affirmed.

McGuiness , P. J., and Pollak , J., concurred.

APPENDIX B — ORDER DENYING DEFENDANT GEOGRAPHIC EXPEDITIONS, INC.'S MOTION TO DISMISS OR, IN THE ALTERNATIVE, TO STAY ACTION AND COMPEL ARBITRATION FILED DECEMBER 10, 2008

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF SAN FRANCISCO

Case No.: CGC-08-477496

THE ESTATE OF JASON LHOTKA by ELENA LHOTKA, executrix; ELENA LHOTKA; NICHOLAS LHOTKA, by his guardian ad litem, ELENA LHOTKA; and SANDRA MENEFEE,

Plaintiffs,

v.

GEOGRAPHIC EXPEDITIONS, INC. also doing business as INNERASIA TRAVEL GROUP, and DOES 1 through 50,

Defendants.

ORDER DENYING DEFENDANT GEOGRAPHIC EXPEDITIONS, INC.'S MOTION TO DISMISS OR, IN THE ALTERNATIVE, TO STAY ACTION AND COMPEL ARBITRATION

Appendix B

The motion of defendant GEOGRAPHIC EXPEDITIONS, INC. to dismiss or, in the alternative, to stay action and compel arbitration came on for hearing in department 302 of this Court on November 18, 2008. David J. Bennion appeared on behalf of plaintiffs THE ESTATE OF JASON LHOTKA by ELENA LHOTKA, executrix; ELENA LHOTKA; NICHOLAS LHOTKA, by his guardian ad litem, ELENA LHOTKA; and SANDRA MENEFEE. Rodney E. Gould appeared for defendant GEOGRAPHIC EXPEDITIONS, INC.

Having read the motion, the points and authorities and the declarations filed by the parties, and having heard argument of counsel, the Court adopted its tentative ruling, which is attached hereto as "Exhibit A" and states as follows:

The motion to compel arbitration is denied. The agreement to arbitrate is unconscionable under *Armendariz v. Foundation Health Psychare Services, Inc.* (2000) 24 Cal.4th 83. Under the Federal Arbitration Act, the court has the power to declare an arbitration clause unconscionable. See *Klussman v. Cross County Bank* (2005) 134 Cal.App.4th 1283, 1290-91. The agreement at issue is both procedurally and substantively unconscionable. The Sano letter establishes that the agreement was presented as a Take It Or Leave It proposition and was also represented to be consistent with industry practice. As a consequence if the plaintiff and decedent wished to go on this trip, they could do so only on these terms. Unconscionability

also permeates the substantive terms of the agreement to arbitrate. The problematic terms are the limitation on damages, the indemnity of GeoEx, the requirement that GeoEx costs and attorneys' fees be paid if suit is filed related to certain claims, splitting the costs of mediation, the absence of an agreement on the cost of arbitration and the lack of mutuality as to each of these terms. As a consequence, this is not a case where the court may strike a single clause and compel arbitration. *Armendariz, supra*, 24 Cal.4th at 124.

THEREFORE, IT IS ORDERED THAT the motion of defendant GEOGRAPHIC EXPEDITIONS, INC. to dismiss or, in the alternative, to stay action and compel arbitration is denied.

Dated: DEC 10 2008

By: PATRICK J. MAHONEY
JUDGE OF THE SUPERIOR COURT

Approved as to form:

LAURIE E. SHERWOOD, Esq.
Attorneys for Defendant
GEOGRAPHIC EXPEDITIONS, INC.

Appendix B

EXHIBIT A

Superior Court of California
County of San Francisco

LAW AND MOTION CALENDAR

HEARING ON TUESDAY NOV-18-2008 9:30 AM
COURTROOM 302 JUDGE PATRICK MAHONEY

10) THE ESTATE OF JASON LHOTKA BY ELENA LHOTKA, et al VS. GEOGRAPHIC I

NOTICE OF MOTION AND MOTION TO DISMISS OR, IN THE ALTERNATIVE, TO STAY ACTION AND TO COMPEL ARBITRATION

MOVING PARTY: DEFENDANT GEOGRAPHIC EXPEDITIONS, INC., ALSO DOING BUSINESS
NUMBER OF CONTINUANCES: 0

TENTATIVE RULING: SET FOR HEARING ON TUESDAY, NOVEMBER 18, 2008, LINE 10, DEFENDANT GEOGRAPHIC EXPEDITIONS, INC.'S MOTION TO DISMISS OR, IN THE ALTERNATIVE, TO STAY ACTION AND TO COMPEL ARBITRATION.

THE MOTION TO COMPEL ARBITRATION IS DENIED. THE AGREEMENT TO ARBITRATE IS UNCONSCIONABLE UNDER ARMENDARIZ V. FOUNDATION HEALTH PSYCHARE SERVICES,

INC. (2000) 24 CAL.4TH 83. UNDER THE FEDERAL ARBITRATION ACT, THE COURT HAS THE POWER TO DECLARE AN ARBITRATION CLAUSE UNCONSCIONABLE. SEE KLUSSMAN V. CROSS COUNTRY BANK (2005) 134 CAL.APP.4TH 1283, 1290-1291. THE AGREEMENT AS ISSUE IS BOTH PROCEDURALLY AND SUBSTANTIVELY UNCONSCIONABLE. THE SANO LETTER ESTABLISHES THAT THE AGREEMENT WAS PRESENTED AS A TAKE IT OR LEAVE IT PROPOSITION AND WAS ALSO REPRESENTED TO BE CONSISTENT WITH INDUSTRY PRACTICE. AS A CONSEQUENCE IF THE PLAINTIFF AND DECEDENT WISHED TO GO ON THIS TRIP, THEY COULD DO SO ONLY ON THESE TERMS. UNCONSCIONABILITY ALSO PERMEATES THE SUBSTANTIVE TERMS OF THE AGREEMENT TO THE REQUIREMENT THAT GEOEX COSTS AND ATTORNEYS' FEES BE PAID IF SUIT IS FILED RELATED TO CERTAIN CLAIMS, SPLITTING THE COSTS OF MEDIATION, THE ABSENCE OF AN AGREEMENT ON THE COST OF ARBITRATION AND THE LACK OF MUTUALITY AS TO EACH OF THESE TERMS. AS A CONSEQUENCE, THIS IS NOT A CASE WHERE THE COURT MAY STRIKE A SINGLE CLAUSE AND COMPEL ARBITRATION. ARMENDARIZ SUPRA 24 CAL.4TH AT 124. =(302/PJM/PB)

APPENDIX C — ORDER OF THE SUPREME COURT OF CALIFORNIA DENYING PETITION FOR REHEARING FILED APRIL 14, 2010

SUPREME COURT OF CALIFORNIA

S180886

2010 Cal. LEXIS 3320

ELENA LHOTKA, Individually and as Executor, etc. et al.,

Plaintiffs and Respondents,

v. GEOGRAPHIC EXPEDITIONS, INC.,

Defendant and Appellant.

April 14, 2010, Filed

JUDGES: MORENO, Acting Chief Justice. George, C. J., was absent and did not participate.

OPINION BY: MORENO

OPINION

Petition for review denied.

George, C. J., was absent and did not participate.